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THE WAR CLAUSE IN LIFE INSURANCE POLICIES

The increasing number of conflicting decisions interpreting the war clause in life insurance policies is emphasizing the confusion in which this branch of contract law has been left by the war. The usual war clause, exempting the company from liability if the assured dies "while in the service", *etc.*, is broad enough, if given a literal meaning to preclude from recovery the beneficiary of anyone who has taken the oath of a soldier or sailor, whether he is guarding a swivel-chair in Washington or "going over the top" in France when he meets his death.¹ Is the fair meaning to exempt the insurer from liability when the assured dies as a result of causes operating as commonly among civilians as among soldiers and in circumstances no different from those of civilian life, merely because the assured went through the form of raising his right hand and taking the oath of allegiance? Or, even if the fair meaning of the clause is to condition the promise of the insurer upon the assured's abstention from war service, ought not the law, in moulding the legal obligation to be imposed upon the insurer in consequence of his agreement with the assured and the acceptance of premiums, disregard the qualifying terms of the agreement and prevent a forfeiture? To effectuate the insurer's intentions in inserting the clause, his liability should be limited, unless he has assumed the additional war risk, only where the death of the assured was the result of a hazard peculiar to the war, subject to the individual company's ability to pay as affected by the war losses of such company.

How can the real intention of the insurer be ascertained? The relatively few cases dealing with the war clause, which were decided before 1914,² determined few questions and afford no adequate rules for interpreting the war clauses in modern life policies; for the collection of statistical data has made the calculation of risks in the modern life policy more scientific, and consequently the policy is more free from restrictions of any kind than the policy of a generation ago.³

¹ See the following cases, where the assured died of disease in camps in the United States: *Miller v. Illinois Bankers' Life Ass'n* (Ark. 1919) 212 S. W. 310; *Reid v. American Nat. Assur. Co.* (Mo. App. 1920) 218 S. W. 957; *Ruddock v. Detroit Life Ins. Co.* (Mich. 1920) 177 N. W. 242. See also *Mattox v. New England Mut. Life Ins. Co.* (Ga. App. 1920) 103 S. E. 180 (Assured died of pneumonia aboard a transport bound for France); *Sandstedt v. American Cent. Life Ins. Co.* (Wash. 1920) 186 Pac. 1069, and *Slaughter v. Protective League Life Ins. Co.* (Mo. App. 1920) 223 S. W. 819 (Assured died of pneumonia in France).

² See 4 Joyce, *Law of Insurance* (2nd ed. 1918) § 2237; 3 Cooley, *Briefs on the Law of Insurance* (1905) 2217; *Provident Savings Life Assurance Society of N. Y. v. Bellew* (1904) 35 Can. Sup. Ct. 35 (when risk attached to soldiers sent to the Boer War).

³ See William F. Gephart, *Effects of the War upon Insurance* (1918, published by Carnegie Endowment for International Peace) 57 *et seq.*

The words of the present war clause seem to make *status* the basis of the assumption of the risk. But the very practice of the companies in waiving these clauses by granting permits⁴ indicates quite strongly that status was not the basis of calculating the risks assumed, and that even the companies have repudiated such interpretation. On the other hand, it is quite certain that the insurers desired to be relieved of liability in case of death due to some hazard of war, unless they provided otherwise.

Furthermore, "increase of hazard" was not the condition intended to relieve the insurer from liability under the contract; but, as it will appear presently, rather the *death of the assured as a result of such increase of hazard due to the war* was the condition limiting liability. Instead of "increase of hazard" as the basis for assuming the new insurance of men who might possibly be called into service, which would be the only sound basis under normal conditions, the companies, out of motives of business generosity and patriotism, pursued a policy of accepting a limited number of possible war risks on terms which were sufficiently indefinite to afford the companies the protection which subsequent events might necessitate. As in the cases where the parties contemplate that their rights and duties under a contract be defined or modified by subsequent circumstances, the courts determine accordingly the legal relations in view of the subsequent events;⁵ so in the situation under discussion the courts ought to determine the extent of the insurer's liability by examining not only the data existing at the time the contract was formulated but also the facts that have since become apparent, and which the insurer intended to govern his conduct toward policyholders in the service.

Prior to the world war, the insurance companies generally, in accordance with the tendency of liberalizing the contract, removed from life policies all restrictions on residence and military service, because the possibility of an extensive war, in which the United States would be involved, was regarded as remote by actuaries and whatever losses might be suffered from such causes should be distributed over the entire body of policyholders according to the social function of insurance.⁶ With the Vera Cruz incident, some companies, apprehensive, began inserting such clauses, though most of the companies, believing the possible increased losses as negligible, refrained from doing likewise. With the outbreak of the War in 1914, insurance companies

⁴ See statement of Mr. Francis V. Keesling, *infra*. Mr. Shepherd, the actuary of the Home Life Ins. Co. who drew up the clause for his company under the direction of Mr. Henry Moir, declared that such permits were regularly granted to men in the camps in this country.

⁵ See (1920) 20 COLUMBIA LAW REV. 776, 778, and 778 n. 10.

⁶ Mr. Shepherd was my informant. See *Address* of William A. Hutcheson, Second Vice-President and Actuary, Mutual Life Ins. Co., N. Y., before Ass'n of Life Ins. Presidents, on Dec. 6, 1917, at p. 2. Same material in Gephart, *op. cit.*, 57 *et seq.*

began inserting military service restrictions, evidently anticipating the action of such residents in America as would feel so keenly on the respective merits of the European controversy as to take a fighting part before the United States would join the affray.⁷ The real change, however, came with our entrance into the war.⁸

The actuarial world had no certain data and, therefore, no accurate basis for determining what the risks of war were. The *Economic World* at this time commented editorially:⁹

"As against this consideration, however, there arises another, namely, that from their very nature the extra hazards of war have in them a large element of incalculability, since war is not the nominal [normal?] state of human society and thus from its comparative rarity as well as from its great changes which take place from generation to generation in the methods of conducting it, it affords little opportunity for collecting dependable experience in the insurance sense. Guesswork, therefore, necessarily plays an inordinate part in the calculation of the true cost of war risks to the insurers."

The mortality statistics from the previous American wars were soon found to be no satisfactory guide; the reports from the warring powers, necessarily incomplete, were inadequate, especially in view of the difficulty of telling just what part the United States would play in the actual conduct of the War.¹⁰ During the Spanish-American War, the insurance officials who had placed no great restrictions in the policy had their judgment vindicated by the mortality experience. However, the mortality from disease and wounds in other wars indicated caution. The progress of military and naval sanitation made statistics of previous war losses from disease—and this was recognized as causing the greater part of our losses in the Spanish-American War and in previous wars—practically useless. The losses of the European insurance companies could furnish no accurate guide, though their experience first in extreme liberality and then under economic compulsion in charging an extra premium, progressively increasing to ten per cent., was rather instructive. Also remembering that insurance is a social institution pro-

⁷ The Miller Case seems to illustrate this; for the policy issued on March 6, 1915, declares for non-liability in case of death while in the "service . . . of any government".

⁸ For an estimate of the amount of insurance subject to the war risk, see the *Address* of Mr. Hutcheson, *supra*, footnote 6, at p. 2.

⁹ (April 28, 1917) 99 *Economic World* 596, cited in Gephart, *op. cit.*, 8. See also an *Address* to the same effect by Mr. Henry Moir, Actuary and Director of the Home Life Ins. Co., former President of the Actuarial Society of America, reprinted in (Sept. 21, 1918) 102 *Economic World* 417.

¹⁰ Most of this data may be found in the reprints, issued by the Ass'n of Life Ins. Presidents, of Mr. William A. Hutcheson's *Address on Life Insurance and the War* (Dec. 6, 1917), and of the letter by Mr. Robert Lynn Cox, General Counsel and Manager of the Association (July 14, 1916), accompanying a report of a special committee to the Association. The substance of these may be found conveniently in Gephart, *op. cit.*, 57 *et seq.* and 105 *et seq.* See also the files of the *Economic World* for this period, especially (1918) 102 *Economic World*, 417.

viding "a system or method for the distribution through a wide area and among many of losses sustained by an individual,"¹¹ the administrators of the insurance funds recognized their duty to do what they could to ease the strain on certain individuals in the community by distributing it, without, however, jeopardizing their solvency. The *Economic World* articulated this feeling thus:¹²

"The first of these considerations is that of patriotic duty, involving the employment of our entire system of insurance in all its varieties to ease, in so far as this is practicable and feasible, the strains and hazards of war for the community at large. . . . It is in the public interest that these excesses of risk for the relatively few should be distributed as evenly as possible over the entire population, and it is a part of the patriotic duty of insurance to do what it can to accomplish this even distribution. . . . Yet underwriters have always to bear in mind the overriding obligation to maintain their solvency and not to do injustice to the general body of their policyholders in order that they may show an overfull measure of patriotic generosity to the group or groups of policyholders particularly exposed to the hazards of war."

In other words, the American actuaries had no certain data upon which to calculate their risks and in fact did not actually know what risks they were willing to assume; therefore, they drew up a uniform war clause, which was broad enough to exclude whatever risks the exigencies to arise might require. A secretary in a large life insurance company, who was present at all the conferences while the war clause was being drawn up by the actuaries of his company, told the writer that the clause was purposely drawn so broadly with the view that the company would relax the rigid application as the conditions might warrant; that, in effect, hindsight was to be their guide in treating with claimants. The uniform clause read:¹³

"During the first ten years of this policy military or naval service in time of war is a risk not assumed by the company unless the insured shall give notice thereof to the company within thirty-one days after entering on such service, and pay such extra premiums as the company may fix therefor. In event of the insured entering upon such service and failing to give such notice, or failing to pay such extra premiums at the times and in the manner required, the liability of the company for death of the insured during such period of ten years, while engaged in or as a result of such service, shall be limited to the reserve at the time of death, less any indebtedness hereon to the company."

¹¹ Mr. William Brosmith, General Counsel of Travelers Ins. Co., in an *Address* at American Life Convention, Omaha, Neb., on Sept. 23, 1919, reprinted in (Dec. 20, 1919) 104 *Economic World* 561.

¹² *Supra*, footnote 9.

¹³ See Report to Ass'n of Life Ins. Presidents (July 12, 1916) by a Committee, of which Mr. Henry Moir was Chairman. Also cited in Gephart, *op. cit.*, 64. For the English clause, see Gephart, *op. cit.*, 73; for the Queensland. Australia, clause, see (July 26, 1919) 104 *Economic World* 134.

This clause, or some modification of it, many companies embodied in their contracts.

The practice of the individual companies in modifying the recommended clause, or in granting the privileges sought by the assured in the service, is illuminating on the question of what risks were actually assumed.¹⁴ All companies insisted as a condition of the issuance of the policy that the assured secure a permit before or within a certain time after entering the service. It was usually granted by life insurance companies, to whom entrance into the service and assignment to a camp in the United States meant no increase beyond the hazards of ordinary life.¹⁵ If the assured died in France from natural causes or from causes not peculiar to the war, the companies paid the claims without dispute, though the assured had not paid the extra premium charged for nor secured the required permit for service abroad.¹⁶

The companies differed as to whether to distribute the possible losses from war casualties over the entire body of policyholders engaged in the service—it would, of course, be unfair, in the absence of more data on losses, to place the burden on the old policyholders—by charging a uniform fee regardless whether in service in this country or in France, or to exempt the ordinary soldier in this country from any extra charge, as long as he was not engaged in an extrahazardous branch of the service, and charge a flat fee as soon as the soldier went across.¹⁷ Mr. Francis V. Keesling, Vice-president of the West Coast-San Francisco Life Ins. Co., declared:¹⁸

"The companies, however, quite generally issued 'free permits' for services within the continental boundaries of the United States; but uniformly the issuance of a permit for foreign service was conditioned upon the payment of an extra premium and the restriction."

The practice of the claim-adjusting departments, though not at all uniform, would indicate that the companies were willing to pay all

¹⁴ For a discussion of the war clauses and the practice of the companies, see Gephart, *op. cit.*, 61 *et seq.* and 65, and the Report of Robert Lynn Cox (May 11, 1916) to the Ass'n of Life Ins. Presidents.

¹⁵ See the policies cited in Gephart, *op. cit.*, 65 *et seq.* Mr. Shepherd, of the Home Life, Mr. O'Keefe, of the Preferred Accident, Dr. C. V. Everett, of the Fidelity and Casualty, and Mr. Robert L. Jones, President of the New York Life Underwriters and of the State Mutual Life, made statements to this effect to the writer.

¹⁶ Such, my informants told me, was the practice, though not uniform. The rarity of cases involving this point, which must have arisen frequently during the late war, is a confirmation of the accuracy of my information.

¹⁷ About \$37.50 or \$50.00 per \$1,000 under the former plan and about \$100 per \$1,000 under the latter plan. See *supra*, footnote 14. See *Carlson v. Scandia Life Ins. Co.* (Wis. 1919) 174 N. W. 896; *Mattox v. New England Mut. Life Ins. Co.*, *supra*, footnote 1; *Security Life Ins. Co. v. Bates* (Ark. 1920) 222 S. W. 740.

¹⁸ "After-the-war Life Insurance Problems: The War Clause and Experiences of Life Insurance Companies in Litigation Thereunder", an *Address* at American Life Convention, Omaha, Neb., Sept. 22, 1919, reprinted in (Jan. 24, 1920) 105 *Economic World* 130.

claims for deaths occurring in this country or in France, provided that the assured was not killed in battle or death did not result from some cause peculiar to the war.¹⁹ Naturally, in paying these claims, generally after the Armistice, and after it was certain that the losses were likely to be very small, the companies made sure to insist that they were doing this out of patriotic or business liberality and strictly repudiated the existence of any right in the beneficiaries to enforce payment.

Besides, the war losses did not affect the normal mortality seriously.

"An inquiry conducted by the Connecticut Insurance Department indicates that war claims, meaning all deaths suffered by men in the service, not including influenza, was equivalent to about a 6 per cent increase on normal mortality. Reports received by THE INSURANCE PRESS confirm this figure. On that basis the war losses by life insurance companies of the United States in 1918 amounted to about \$23,000,000."²⁰

These figures do not show what percentage of war losses was due to the new insurance accepted with the intention of covering the additional risk. But there is every indication that it was of negligible significance. The influenza pandemic increased the mortality among service men, but this cause increased the mortality rate even among civilians.²¹ Mr. Arthur Hunter, former President of the Actuarial Society of America, was of the opinion that the mortality rate among military men from the influenza pandemic was not much greater than among civilians.²² The war claims, however, constituted a relatively insignificant item in the claims paid out during this period.²³

¹⁹ Statements to this effect were made to the writer by numerous insurance men, including Dr. Everett, Messrs. O'Keefe, Shepherd and Jones. Compare the testimony of the insurance agent, Mr. Scroggins, in *Miller v. Illinois Bankers' Life Ass'n*, 212 S. W. 310, 311, for an illustration of the understanding of the insurance world as to what risks were not intended to be excluded. He testified as follows:

"He asked me if the policy would be good in event of his death in the service, and I told him it was my construction of the war clause in this policy, if he died of natural causes, it would be paid, but if he died by violence, while in battle, it would not. I also called his attention to the Fulkerson claim as my conclusion of the matter. And he says, 'Well, if it won't be good, I don't want to pay any more, but, if it will, I want to continue my policy;' and I told him it would be good in event of his death by natural causes. So one year's premium was paid to me a few days later, almost on the same spot of ground. * * * Mr. Ben Fulkerson had a policy. He volunteered in the service at Jefferson Barracks, Mo., in September, 1916, and this country was not at war at that time, and he died of contagious disease in the army, and the company paid his claim."

²⁰ (Sept. 3, 1919) 49 Insurance Press 2.

²¹ See (Feb. 14, 1920) 105 Economic World 242; (Sept. 2, 1919) 14 Best's Life Insurance News 47, 48.

²² "While it is practically impossible at the present time to obtain accurate information on this subject, sufficient data are contained in the report of the Surgeon-General for the six months ending December 27, 1918, [the period of the greatest ravages of the pandemic] to indicate that there has not been such a marked difference between the death rates in the camps and in the cities as has been stated. . . . The deaths per thousand in the camps were probably higher than in the cities, but not to the extent indicated by some of the writers." Mr. Arthur Hunter, in (Feb. 15, 1919) 103 Economic World 239, 240.

²³ Mr. Tarbell, Actuary of the Connecticut Insurance Dept., in a paper on

Therefore, a great number of companies, realizing that the losses actually were not significant and might, with perfect fairness to the general body of policyholders, be shifted to such general body, have followed the precedent they set after the Spanish-American War by returning the extra premiums. Some companies had definitely provided for such return of premiums in the policies they issued. The policy of returning the extra premium varied with the company: some insisted that the contract be carried out to the letter as to restrictions and as to the payment of the extra premium, and, of course, such companies have refused to return the extra premium; while others, observing their own precedent for generosity set after the Spanish-American War, have returned it. Some companies in returning the extra premium have given a preference to those men who served in this country, because the risk was not commensurate with the charge made, and have divided the surplus *pro rata* among those who had engaged in foreign service. This would mean that what money they charged as extra premiums was held merely as security against any extraordinary losses they might suffer as a result of an increased mortality rate among service men.²⁴

So in fact the War has not affected the insurance companies of the United States adversely as far as any increased mortality from soldiers or sailors is concerned. In fact the War and the influenza pandemic have been followed by an amazing increase in the new business written; specifically, the new business written in 1919 "is nearly \$4,613,000,000 more than was written in the year 1914, or 149%".²⁵

the influenza epidemic read before the National Convention of Insurance Commissioners at Hartford, on Sept. 11, 1919, said:

"Before leaving the life insurance companies, I wish to quote from a letter received from one of the largest companies in the United States . . .

"Considering the seven months period, October 1st, 1918-April 30th, 1919, the total death claims resulting primarily from pneumonia or influenza were approximately \$27,500,000. The claims normally to be expected from these causes according to our estimates were \$3,400,000, leaving excess pneumonia and influenza claims of \$24,100,000. The total death claims paid by the Company during the seven months were \$51,300,000. Deducting from this the excess pneumonia and influenza claims of \$24,100,000 and the *war claims where the cause was killed, wounded or missing*, \$2 000 000 (italics are the writer's) we have \$25 200,000 representing the 'normal' claims for the seven months. The excess claims from pneumonia and influenza, \$24,100,000, therefore, represent an addition of 96 per cent. to the 'normal' claims for the seven months." Reprinted in (Sept. 2, 1919) 14 *Best's Life Ins. News* 47, 48.

The war claims probably are limited to policyholders whose policies were issued before the war and not subject to war restrictions. At any rate, it does not appear what percentage of the new policyholders was included in these war claims, if at all.

²⁴ Mr. Henry Moir said: Most European companies charge ten per cent., "with the proviso that at the termination of the war the actual death losses from war service will be segregated and if the extra premium thus charged should prove more than the proper sum for the hazard, a refund of the balance will be made to the continuing policyholders. This is equitable and fair for any insurance now being effected. It means briefly that the insurance companies cannot possibly make any profit out of the soldiers' insurance. A loss may be sustained on such new insurance, but it is minimized. . . ." (Sept. 21, 1918) 102 *Economic World* 417, 418. Cf. *Mattox v. New England Mut. Life Ins. Co.*, *supra*; *Sandstedt v. American Cent. Life Ins. Co.*, *supra*, footnote 1.

The fair question implicit in the preceding discussion is: Supposing you eliminate all deaths which occurred as a result of the war, does the remaining group composed of those who have entered the military service present a greater than ordinary hazard, *i. e.*, such a group as the ordinary life insurance would exclude, or accept only on special terms? In the case of a company accepting only preferred risks the answer might conceivably be in the affirmative. But in the case of the ordinary life insurance company there is every indication for answering decidedly in the negative. Particular life insurance companies might have been affected adversely by the war in that the group composing those who were in the military service presented a greater than ordinary hazard. In such a case, the company ought to be permitted to show the facts and to show that he losses may not be distributed over the general body of policyholders with fairness to such body; and such proof ought to constitute a valid defense to an action on the policy. Then, the court in determining when to allow this defense might properly accept the classification of hazards of service reflected in the practice of companies in paying claims and in prorating the returned extra premiums. At any rate, the rules of law suggested below are offered tentatively, and always subject to the possible effects they will have on the particular insurance company involved in the litigation. Only in this way can we give effect to the real intention of the insurer.

With the foregoing considerations in mind, let us examine the decided cases in an effort to classify the conflicting decisions and see how far the courts were motivated by the dictates of sound economic and social policy, or how far, at any rate, their decisions effectuate such a policy. The clauses in the different policies are essentially the same, though there are minor differences in wording; they provide for an exemption from liability for death "while in the service",²⁶ "while engaged in the military or naval service",²⁷ or "while engaged in the service or in consequence of such service",²⁸ If given a broad meaning,

²⁶ Mr. William A. Day in an *Address* at the Convention of Ass'n of Life Ins. Presidents (Dec. 4, 1919), reprinted in (Jan. 3, 1920) 105 *Economic World* 21.

²⁷ See *Miller v. Illinois Bankers' Life Ass'n*, *supra*, footnote 1 (recovery denied); *cf. Redd v. American Cent. Life Ins. Co.* (1918) 200 Mo. App. 383, 207 S. W. 74 (recovery allowed—"active service").

²⁸ See the following cases, where recovery was denied: *Reid v. American Nat. Assur. Co.*, *supra*, footnote 1; *Ruddock v. Detroit Life Ins. Co.*, *supra*, footnote 1; *Mattox v. New England Mut. Life Ins. Co.*, *supra*, footnote 1; *Slaughter v. Protective League Life Ins. Co.*, *supra*, footnote 1.

See also the following cases, where recovery was allowed: *Myli v. American Life Ins. Co.* (N. D. 1919) 175 N. W. 631; *Carlson v. Scandia Life Ins. Co.*, *supra*, footnote 17; *Benham v. American Central Life Ins. Co.* (Ark. 1920) 217 S. W. 462; *Nutt v. Security Life Ins. Co.* (Ark. 1920) 218 S. W. 675; *Malone v. State Life Ins. Co.* (Mo. App. 1919) 213 S. W. 877.

²⁹ See the following cases, where recovery was allowed: *Benham v. American Central Life Ins. Co.*, *supra*, footnote 27; *cf. Kelly v. Fidelity Mut. Life Ins. Co.* (1919) 169 Wis. 274, 172 N. W. 152, 4 A. L. R. 845 and note. See also the following where recovery was denied: *Sandstedt v. American Cent. Life Ins. Co.*,

they would preclude liability of the insurer for the death of any assured after he has taken the oath to serve in the military or naval forces; but this interpretation, though adopted by some courts,²⁹ must be rejected as not intended by the insurer and not in accordance with the understanding of the insurance world.³⁰ Some policies, issued before our entrance into the war, provided for limited or no liability for such death.³¹ The policies issued after our entrance into the war usually contained some provision for obtaining permits after entering service and the payment of whatever extra premium might be required and also provided for limited or no liability for failure to do so.³² Some policies provided for the assumption of the additional war risk upon a definite basis³³ or upon terms to be made when the assured applied for the permit. Many of the cases to be discussed involve the question of the extent of the insurer's liability where the assured failed to secure such permit and to pay such extra premium.³⁴ Let us then classify the decisions according to the nature of the assured's death and the disputed risks involved.

1. *Death caused by war.* Where the assured was killed in battle³⁵ or his death resulted from conditions peculiar to war,³⁶ no recovery was allowed. Where, however, the policy provides for the assumption of such risk—death caused by war—upon the procuring of a

supra, footnote 1; *Gillies v. Preferred Accident Ins. Co.* (1920) 110 Misc. 489, 181 N. Y. Supp. 550; *Coxe v. Employers' Liability Assurance Corporation* [1916] 2 K. B. 629.

²⁹ See *Miller v. Illinois Bankers' Life Ass'n*, *supra*, footnote 1; *Reid v. American Nat. Assur. Co.*, *supra*, footnote 1; *Ruddock v. Detroit Life Ins. Co.*, *supra*, footnote 1; *Mattox v. New England Mut. Life Ins. Co.*, *supra*, footnote 1.

³⁰ See footnote 4; also *Nutt v. Security Life Ins. Co.*, *supra*, footnote 27.

³¹ See *Kelly v. Fidelity Mut. Life Ins. Co.*, *supra*, footnote 28; *Gillies v. Preferred Accident Ins. Co.*, *supra*, footnote 28; cf. *Coxe v. Employers' Liability Assurance Corporation*, *supra*, footnote 28.

³² See cases cited in footnotes 26, 27, 28; *Malone v. State Life Ins. Co.*, *supra*, footnote 27 (Provided for a permit and limited liability even with such permit).

³³ See *Reid v. American Nat. Assur. Co.*, *supra*, footnote 1 (7½% of the face of the policy additional).

³⁴ See cases cited in footnotes 26, 27, 28, especially *Carlson v. Scandia Life Ins. Co.*, and *Sandstedt v. American Cent. Life Ins. Co.*

³⁵ *Gillies v. Preferred Accident Ins. Co.* (1920) 110 Misc. 489, 181 N. Y. Supp. 550. In this case, an accident insurance policy was issued on October 4, 1908, to the deceased, who was classified as "advertising", "office work and solicitor". The assured enlisted and was killed in battle on September 4, 1918. No permit was granted. The policy contained the following clauses: "If the insured shall be injured, fatally or otherwise, in any occupation classified by the company as more hazardous than that stated in the schedule of warranties hereafter contained, he or his beneficiary, as the case may be, shall be paid only the amount fixed for such increased hazard in accordance with the classification of the risks by the company." "Army officer in field service not insurable." Recovery of the face of the policy was denied. Mr. O'Keefe, the head of the claim-adjusting department, said that his company did not dispute claims on behalf of service men who had died of natural causes, though they preferred to cancel policies wherever they heard of men going to France.

Cf. *Martin v. People's Mut. Life Ins. Co.* (Ark. 1920) 223 S. W. 389. In this case, there was an accident insurance policy, issued on March 16, 1917. It does not appear whether there was a war clause in the policy. The assured

permit and the payment of an extra premium, and such conditions have been complied with, or the policy contains no service restrictions, the insurer would be liable.^{36a} But if the assured has not complied with such conditions, no liability for such death should be imposed on the insurer; because the assumption of that unusual risk was made to depend upon the willingness of the insurer to grant the permit in the future and upon the payment of the extra premium by the assured, and, just as no duty is imposed on an insurer where the assured has not paid the initial premium and there has been no waiver of payment, likewise in these cases there has been no inception of the insurer's liability for this new kind of risk. *La Rue v. Kansas Mut. Life Ins. Co.*³⁷ is a case precisely in point. In that case the assured enlisted in time of war without securing a permit and paying the extra premium, and was killed by a Filipino insurrecto with a bolo while resting up in territory still being pacified; recovery was denied. The supposititious case, put by the beneficiary's counsel, if "the deceased had lost his life at Ft. Riley, in this state, after enlistment, and while his regiment was awaiting orders to move to the Philippine Islands", the court declared was "unnecessary to discuss".

was drafted, and on July 22, 1918, was killed in battle. It was held that this was not accidental death within the meaning of the policy.

³⁶ *La Rue v. Kansas Mut. Life Ins. Co.* (1904) 68 Kan. 539, 75 Pac. 494. The assured enlisted in September, 1899, and was killed in May, 1900, by a Filipino insurrecto with a bolo while resting up in territory still being pacified. No permit had been applied for nor granted. The policy contained the following clause: "Military or Naval Service.—The insured under this policy is permitted to serve in the militia or in the military or naval service of the United States in time of peace without prejudice to his policy; and he may so serve in time of war by giving the Company notice in writing, and paying an extra premium therefor, not to exceed three per cent. per annum upon the amount insured. But should notice not be given and the extra premium for war hazard not be paid at the time the risk is incurred, the Company will be liable for the reserve only on this policy, computed according to the actuary's table of mortality and four per cent interest." Recovery was denied.

Coxe v. Employers' Liability Assurance Corporation [1916] 2 K. B. 629. In this case, there was an accident insurance policy. The assured enlisted on September 30, 1914. On May 17, 1915, while in the course of his military duties on a round of inspection, he was killed by a train on a private right of way which was darkened and rendered dangerous by the war. The policy contained this clause: "This policy does not insure against death or disablement, directly or indirectly caused by, arising from, or traceable to any of the following, viz.: . . . war, invasion or civil commotion." Recovery was denied.

Cf. Vanderbilt v. Travelers' Ins. Co. (1920) 112 Misc. 248, 184 N. Y. Supp. 54 (Beneficiary of a Lusitania victim could not recover; the clause read: "Nor shall this insurance cover . . . death . . . resulting, directly or indirectly, wholly or partly, from . . . war or riot."); *Letts v. Excess Ins. Co.* (K. B. D. 1916) 32 T. L. R. 361 (Beneficiary of a Lusitania victim could not recover, because war risks were excluded); *Lock v. Army, Navy, and General Assurance Ass'n* (Ch. D. 1915) 31 T. L. R. 297 (Cause of battleship explosion was material to the determination of the company's liability. The policy contained the following clause: "This policy shall not cover death of or injury to the assured . . . caused . . . by war, invasion, or civil tumult"); *Ayrey v. British Legal, etc., Assurance Co.* (K. B. D. 1917) 34 T. L. R. 111 (The assured, while waiting to go mine-sweeping, disappeared, probably by falling overboard. Recovery was allowed).

^{36a} *Cf. Security Life Ins. Co. v. Bates* (Ark. 1920) 222 S. W. 740.

³⁷ *Supra*, footnote 36.

The classes of cases where the policies provided for the assumption of the additional war risk either upon definite terms or upon terms to be fixed in the future present apparent difficulties. These seem to arise when one considers from what source claims for deaths due to war are to be paid. If from the additional premiums charged to men entering the service or going to France, then all men upon entering the service or upon leaving for France, so the argument would proceed, must pay the extra premium, or should have paid it; or in case of failure to pay, no recovery should be allowed where the assured had taken the service oath even though death was due to natural causes. If from the company's general funds, subject to its ability to pay as affected by its war losses, the difficulties disappear.

In the cases where the additional war risk was assumed upon definite terms, might it fairly be argued that the companies intended to segregate all military risks and to create a service insurance fund distinct from their ordinary insurance funds, and that all deaths in service were to be paid for out of that particular fund? The data available and discussed above indicate that the companies did not intend to create a special insurance fund for service men distinct from ordinary policyholders. And the cases where the additional war risk was to be assumed upon terms to be fixed in the future reinforce the conclusion that the new policyholders, accepted with the expectation of their possible entrance into the service, were really regarded as part of the general body of policyholders, subject to such diminution of the benefits normally anticipated as subsequent circumstances might warrant; and that the company looked primarily to its general funds to cover the ordinary risks of life. But even if in the former group of cases the fair implication is that a special fund was to be created and looked to for paying war claims, still, in view of the concomitant intention to use the insurance organization for protecting men who might possibly enter the service and at the same time to attract new business, which would probably be retained after the emergency had ceased, the company ought to be required to shift such loss to the general body of policyholders, unless it can show that such procedure would seriously prejudice the security of the other policyholders. As for the extra premiums charged, the companies should return them, as most companies have done, subject to this limitation that the financial condition of the particular company as the result of such war losses should govern the return of the extra premiums.

The relevance of the preceding discussion becomes more apparent when we consider the possible objection that the effect of the conclusions reached in the last paragraph will be to impose a greater liability upon the generous company, which assumed the additional war risk, than upon the company which was not liable for the additional war risk, by virtue of the fact that the assured failed to secure the

permit and to pay the extra premium, or because it expressly excluded that risk in all events. That is, the stockholders or the policyholders of the generous company are deprived of profits by virtue of their generous contract, whereas those of the less generous company are not. The answer to such objection is implicit in the statement of the objection. Just as some life insurance companies offer additional attractions to new policyholders, like double indemnity, *etc.*, so here one group of companies by their contract offered such additional inducements, subject to such modification as subsequent events might justify.

It might be urged that, if we impose the suggested liability on companies which assumed the additional war risk and apply the above reasoning in justification thereof, it must necessarily follow that a clause precluding recovery where the assured's death was a result of the war should be invalidated, or a clause conditioning liability for the war risk upon the procuring of a permit and the payment of an extra premium should be disregarded, where the statistics show that this loss might be shifted to the general body of policyholders without difficulty. This means, in substance, that such limitation of liability should be declared void as against public policy, where the statistics made available after the war show that the loss may be distributed as suggested. Whatever the respective merits of this controversy are, the courts have uniformly denied that such clauses are void as against public policy. And there seems to be no reason consistent with approved economic and social philosophy for a court, in the absence of legislation, to deny the insurer the privilege of limiting his liability. Besides, what might be urged as a necessary conclusion is a *non sequitur*; because the real purpose of the statistical data would be misconceived. The first part of the data was offered merely to show that the intention of the insurer was to be relieved under the war clause where death was a result of the war. And but for such limitation of liability, the intention of the insurer was to deal with the assured in the service as subsequent statistics might warrant him in doing, consistent with the maintenance of adequate protection for the general body of policyholders. The statistical data are thus employed to determine the rights of the assured entirely in accord with the insurer's intention of their being so determined. And they are not offered to create new obligations contrary to the insurer's real intention.

What would be the extent of the insurer's liability where the assured has not availed himself of the privileges offered by the insurer and his death is not the result of the war? What would the insurer's liability be where the assured's death was due to natural causes, not at all connected with war, but after he had been exposed to the dangers of war? The cases have not considered the latter problem.³⁸ On the

³⁸ In *Gillies v. Preferred Accident Ins. Co.*, *supra*, footnote 35, and in *Martin v. People's Mut. Life Ins. Co.*, *supra*, footnote 35, where recovery was denied to a

former proposition the cases are about equally divided; the better view, it seems, is that the beneficiary of the assured may recover the full face of the policy. The result thus obtained, even though some violence is done to the meaning of the words of the policy, is sound; because the acceptance of the normal premium is only consistent with continuance of insurance against the ordinary risks of death, and because it is in accord with sound social policy and the understanding of the insurance world.

2. *Accidental death.* Where the assured was accidentally killed by a gunshot at the hands of a fellow-soldier in a camp in the United States,³⁹ or by the skidding of his motorcycle into a tree, while he was making the rounds of his inspection of mills 100 miles behind the line of battle,⁴⁰ recovery was allowed on the ground that the death of the

beneficiary of one killed in battle, the policies were accident policies; and it raises an interesting point to consider whether if the assured had died of natural causes, not at all connected with war, but after he had been exposed to the dangers of war, the beneficiary could recover.

It has been pointed out that accident insurance, unlike life insurance, is based on *status*, that the risks to which one is customarily exposed determine his classification, and that though some members of that class die of natural causes and not of causes induced by the peculiar hazards of their class, still in making up the charge for the class the average mortality of people in that class is taken as a basis for such charge. Therefore, the argument concludes, if a person dies after entering another class, or "changes his occupation", his beneficiary is entitled to the amount the annual premium would have purchased for such deferred class, regardless of the fact that death was not caused by any increased hazard. This seems sound enough; but when we consider that people do not change their occupations frequently, that a banker is not likely to become a hod-carrier, and that there are probably as many changes to occupations of a less hazardous class, in which case the insurance company will not pay the larger amount that the premium could have bought, this element should be disregarded except where the assured's death was accelerated by such change. From the tendency of the decisions in which the question of "change of occupation" has arisen, recovery would probably be allowed in our supposititious case. Cf. (1920) 20 COLUMBIA LAW REV. 221, 222.

It is instructive to note that the insurance companies generally do not dispute such claims. Mr. O'Keefe and Dr. Everett, both of accident insurance companies, the former taking only preferred risks and the latter taking ordinary risks, made statements to this effect. Mr. O'Keefe declared that if a man was insured as a banker and became a laborer, and was killed by an automobile while going to church, the claim would not be disputed; that only if death resulted from such "change of occupation", would they dispute the claim. In health insurance, however, recovery in such a case would probably be denied, for even in normal times the usual health insurance policy contains restrictions on travel.

³⁹ *Malone v. State Life Ins. Co.* (Mo. App. 1919) 213 S. W. 877. In this case, the policy was issued on March 24, 1916. The assured enlisted April 25, 1918, and was killed accidentally in this country on July 26, 1918. The policy contained the following clause: "If within five years from date of this policy the insured shall engage in any military or naval service in time of war (death from submarine or aviation service, connected with actual warfare, as a part thereof, is a risk not covered by this policy), the liability of the company in event of the death of the insured while so engaged, or within six months thereafter, as a result of such service, will be limited to the return of the premiums paid hereon, exclusive of any extra premium paid for military or naval service, less any indebtedness to the company hereon." Recovery was allowed.

⁴⁰ *Kelly v. Fidelity Mut. Life Ins. Co.* (1919) 169 Wis. 274, 172 N. W. 152, 4 A. L. R. 845 and note. In this case the policy was issued on March 24, 1916. The assured enlisted in the summer of 1917 and was transferred to France to supervise mills 100 miles behind the battle front. He was accidentally killed by the skidding of his motorcycle. The policy contained the following clauses:

assured was not caused by and did not result from anything peculiar to the service and that such accidental death was common in ordinary civil life. The court in the Kelly Case said:⁴¹

"Civilians are killed almost daily under similar circumstances. The hazards attendant upon riding a motorcycle under the facts set out in this case were not greater because the insured was engaged in the military service of the United States than if he were performing a like act as a civilian and apart from the military service. If this is not the meaning of the clause, it is difficult, if not practically impossible, to ascribe any meaning to it, unless it be held that the fact that the deceased engaged in the military service operated as a limitation upon the liability of the insurer. Such construction cannot be placed upon the clause for the reasons stated. We think this case is clearly distinguishable from *Coxe v. Employers' Liability Assurance Corporation*. . . ."⁴²

The Arkansas court, as it will appear presently makes an interesting economic argument for giving such effect to the phrase "while in the service".

3. *Death due to disease or to natural causes.* Where the assured died of disease, not caused by the service nor peculiar to it, recovery was both allowed⁴³ and denied.

"Military or Naval Service or Work in Connection with Warfare. If the insured shall, within two years from the date of this policy, engage in any military or naval service, or in any work as a civilian in any capacity whatsoever in connection with actual warfare, and shall die within two years of the date of this policy as a result, directly or indirectly, of engaging in such service or work, the liability of the company under this policy shall be limited to the return of the premiums paid, without interest." "There are no restrictions under this policy as to residence, travel, occupation or military or naval service." Recovery was allowed.

⁴¹ *Supra*, footnote 40. Cf. *Nutt v. Security Life Ins. Co.*, *supra*, footnote 27; *Myli v. American Life Ins. Co.*, *supra*, footnote 27; *Benham v. American Central Life Ins. Co.*, *supra*, footnote 27; and cases previously cited.

⁴² As to the *Coxe* Case, see *supra*, footnote 36.

⁴³ *Redd v. American Cent. Life Ins. Co.* (1918) 200 Mo. App. 383, 207 S. W. 74. In this case, the assured enlisted in the medical corps on Nov. 28, 1917, and was stationed in the United States. He died of pneumonia. The application contained the following clause: "That active service in the army or navy, in time of war, shall invalidate said contract of insurance, unless a permit for such service shall have been applied for in writing and indorsed upon the policy by the company, and such extra premium paid therefor upon notification as the then rules of the company may provide." The policy contained the following clause: "In case of death from service in war without permission from the company, the full reserve of the policy at the time of such death only will be paid." No permit was applied for.

Carlson v. Scandia Life Ins. Co. (Wis. 1919) 174 N. W. 896. In this case the policy was issued on March 6, 1918. The assured was drafted on Sept. 4, 1918, and died in a Georgia camp of disease on Oct. 2, 1918. The policy contained the following clause: "Military or naval service in time of war is a risk not assumed under this policy unless a written permit therefor at a rate of extra premium to be fixed by the company shall be granted; and if without such permit . . . and without such extra premium, the insured shall die while so engaged or within six months thereafter, then the liability of the company under this policy shall be limited to the return of the premiums paid thereon without interest." Permit had been applied for but not granted.

Myli v. American Life Ins. Co. (N. D. 1919) 175 N. W. 631. In this case, the policy issued on Oct. 30, 1917. The assured enlisted in the navy about

In the leading cases denying recovery where the assured died of pneumonia in a training camp in the United States,⁴⁵ on board a trans-

June 19, 1918, and was assigned to Dunwoodie Institute, Minneapolis, for training—this was similar to a college. He died of the influenza on Oct 7, 1918, at the city hospital. The policy contained the following clause: "If, within five years from the date hereof, the death of the insured shall occur while engaged in military or naval service in time of war without previously having obtained from the company a permit therefor, the company's liability shall be limited to the cash premiums paid hereon for the three years from date of issuance and thereafter to the legal reserve." Several other clauses restricting liability were interpreted by the court as meaning death as a result of such service, and consequently in conflict with the foregoing clause; in which case the clause most favorable to the assured prevailed. One cannot but believe that the court in its anxiety to favor the assured under these circumstances saw a verbal difficulty which did not exist. No permit was applied for.

Benham v. American Central Life Ins. Co. (Ark. 1920) 217 S. W. 462. In this case, policies were issued on Dec. 20, 1916. The assured enlisted on Feb. 11, 1918, in the aviation corps and was sent to Cornell University for special training. After graduation, he was ordered to report to a Texas camp and en route contracted influenza and died on Oct. 26, 1918, at Dallas. The policy contained the following clause: "Death while engaged in military or naval service in time of war, or in consequence of such service, shall render the company liable for the reserve under this policy, unless the company's permission to engage in such service shall have been obtained, and such extra premium or premiums as the company may require shall have been paid." No permit was applied for.

Nutt v. Security Life Ins. Co. (Ark. 1920) 218 S. W. 675. In this case the policy issued on March 1, 1917. The assured died of influenza in a camp in the United States on Oct. 12, 1918. The policy contained the following clause: "This policy shall be incontestable after one year after its date except for nonpayment of premiums and except for naval or military service in time of war without permit, which are risks not assumed by this company; provided that, in case of the death of the insured while engaged in such service without a permit, the amount payable hereunder shall be the reserve of the policy at date of death." No permit appears to have been applied for. The court refused to follow the Miller Case, which it distinguished, and followed the Benham Case.

⁴⁵*Miller v. Illinois Bankers' Life Ass'n* (Ark. 1919) 212 S. W. 310. In this case, the policy issued on March 6, 1915. The assured died of pneumonia on Dec. 26, 1917, in a Louisiana camp. The policy contained the following clauses: "It is expressly provided that death while in the service in the army or navy of the government in time of war is not a risk covered at any time during the continuance or reinstatement of this policy for any greater sum than the amounts actually paid to the company thereon." "This policy shall be incontestable two years from its date except for nonpayment of premium calls, or death while engaged in or caused by violation of the law or while in the service of the army or navy of any government, which is not a risk covered at any time during the continuance or reinstatement of this policy for any greater sum than the amounts actually paid to the association thereon." This case has been virtually overruled by the later cases of *Benham v. American Central Life Ins. Co.* and *Nutt v. Security Life Ins. Co.*, *supra*, footnote 43.

Reid v. American Nat. Assur. Co. (Mo. App. 1920) 218 S. W. 957. In this case, the policy issued on June 7, 1917. The assured was drafted on July 25, 1918. He died of pneumonia in a North Carolina camp on Oct. 20, 1918. The policy contained the following clause: "Notwithstanding anything herein to the contrary, if the insured shall die or become disabled while engaged in naval or military service in time of war, or in consequence of such service, the amount payable and the liability of the company hereunder shall be limited to an amount equal to the net reserve. . . . After one year from the date of this policy, this condition will be waived, if the insured immediately before engaging in such naval or military service shall pay to the company at its home office an extra cash premium; such extra premium shall be payable annually in advance during the term of such service, and shall be seven and one-half (7½) per cent. of the face of this policy." No permit appears to have been applied for. This case virtually overrules *Redd v. American Cent. Life Ins. Co.*, *supra*, footnote 43.

port,⁴⁶ or in France,⁴⁷ the courts interpreting the clauses "while in the service" and "while engaged in naval or military service in time of war, or in consequence of such service" placed their decisions on the questionable ground that *status* was the intended basis for the assumption

Ruddock v. Detroit Life Ins. Co. (Mich. 1920) 177 N. W. 242. In this case, the policy issued in October, 1917. The assured was drafted on July 26, 1918. He died of pneumonia on Oct. 9, 1918, at Camp Custer. The policy contained the following clause: "This policy and the application therefor, a full and true copy of which is hereto attached, shall constitute the entire contract between the parties hereto. It is unrestricted as to travel, residence, or occupation and shall be incontestable after one year from date, except for nonpayment of premium and except for naval or military service in time of war, without a permit, which are risks not assumed by the company, provided that, in case of the death of the insured while engaged in such service, without a permit, the amount payable hereunder shall be the reserve on the policy at date of death. Military and naval service in time of war shall be construed to include work as a civilian in any capacity whatever in connection with actual warfare." The application contained a similar clause. No permit was applied for.

⁴⁶*Mattox v. New England Mut. Life Ins. Co.* (Ga. App. 1920) 103 S. E. 180. In this case, the policy issued on June 14, 1917. The assured enlisted on August 10, 1918, as a lieutenant in the Dental Corps, whose duties were those of regimental dentist and who would not be required to engage in combatant service. En route to France on a transport, the assured contracted and died of pneumonia on Oct. 15, 1918. The application and policy contained the following clauses: "I further agree that said policy shall be void if within five years from its date I shall engage in military service in time of war without the written consent of the company previously obtained." "I hereby agree that any policy issued by the company on this application shall contain or have attached thereto the following war clause: 'If within five years from the date of this policy the insured shall engage in any military or naval service in time of war, the liability of the company in event of death of the insured while so engaged * * * will be limited to the return of the premiums paid hereon, exclusive of any extra premium paid for military or naval service, less any indebtedness to the company hereon, unless before engaging in such service or within thirty-one days thereafter * * * the insured shall pay to the company at its home office in Boston, Mass., such extra premium as may be required by the company, and in like manner shall pay annually thereafter, on each anniversary of this policy, or within thirty-one days thereafter, while the insured shall continue to be so engaged, such extra premium as may be required by the company. Within one year after the termination of the war the company will return such portion of the extra premium as in its judgment will not be required to cover the extra hazard.'"

⁴⁷*Sandstedt v. American Cent. Life Ins. Co.* (Wash. 1920) 186 Pac. 1069. In this case, the policy was dated March 26, 1917. The assured enlisted on August 17, 1917, and on January 20, 1918, died of pneumonia in France. The policy contained the following clause: "Death while engaged in military or naval service in time of war or in consequence of such service shall render the company liable only for the reserve under this policy unless the company's permission to engage in such service shall have been obtained and such extra premium or premiums as the company may require shall have been paid." The beneficiary had done all the things required by the company in order to obtain the permit, and the papers were awaiting the company's approval when the death occurred. The company at this time was not charging any extra premium to service men, but was requiring them "to sign an application agreeing to pay an extra premium charge in event that excessive mortality in that class should render it necessary." To deny recovery in this case is certainly a harsh insistence on a technicality.

Slaughter v. Protective League Life Ins. Co. (Mo. App. 1920) 223 S. W. 819. In this case, the policy issued on January 1, 1918. While serving in France with the Supply Company, Infantry, he died of bronchial pneumonia on January 9, 1919, after the Armistice. The policy contained the following clause: "The death of the insured while engaged in military or naval service in time of war is a risk not assumed under this policy, and in such event the company will return all the premiums actually paid to the company hereunder."

of any risk. It seems that the courts allowing recovery where the interpretation of similar clauses was involved have more accurately given effect to the probable intention of the insurer as evidence by the understanding of the insurance world.

The economic argument of the Arkansas court that since the insurance company charged the full premium while the assured was in the service, it must have intended to cover the assured to some amount greater than the reserve, which was less than the amount of the annual premium, and since the assured died of natural causes, the premium charged should be regarded as being intended to cover such risk, is rather instructive. The court through Humphreys, J., said: ⁴⁸

"While we do not regard the clause now before us for construction as containing any ambiguity, yet an additional reason in support of the conclusion reached upon the interpretation of the clause may be found in the fact that no reduction was provided in the policy of the premium during the period of enlistment. Had it been the intention of the appellee insurance company to relieve itself from death resulting from natural or ordinary causes during the period of enlistment, it would certainly have provided for a corresponding reduction in the premium. It is hardly supposable that the same premium of \$68.26 per annum would have been exacted to give the insured protection to the extent of the reserve value of the policy when the reserve value [\$51.44] was less than the annual premium. The fact that no reduction was made in the premium is indicative of the intent on the part of the company to exempt itself from the payment of the face of the policy under the war exemption provision from death caused enhanced danger or hazard to life incident to war, and not from death incident to causes for which it imposed and exacted a fixed annual premium."

Quite regardless whether or not the company had notice that the assured was in the service when it accepted the premium, the argument of the Arkansas court holds true.

If recovery of the full face of the policy is denied under these circumstances, it must necessarily follow that as soon as the assured took the oath he ceased to be covered at all, for surely the assured did not intend to pay a premium which would purchase insurance to the amount of such premium or less. If this is true, every surviving service man is entitled to claim a refund of premiums paid during such period. It is doubtful whether the insurance companies would relish this notion of refunding such premiums to ex-service men.

Mr. Francis V. Keesling, in recent letters to the writer, suggests, in answer to the argument of the Arkansas court, that such payment might be regarded as a fee for the privilege of continuing the policy after suspension, "because the insured . . . might become impaired actually during the course of service, and, therefore, be unable to obtain insurance". He further compared this to the situation of the reinstatement

⁴⁸ *Nutt v. Security Life Ins. Co.*, *supra*, footnote 43. But see *Reid v. American Nat. Assur. Co.*, *supra*, footnote 45.

of a policy which has lapsed, in which case the assured must not only pay the premium and interest for the period of delinquency but also resubject himself to physical examination.

That part of the premium known as the reserve quite properly goes to the company upon the reinstatement of the policy; the increased risk due to age is completely taken care of by the annual increase in the amount of the annual reserve. This will take care of the ordinary increase of hazard. That the difference between the annual reserve and the annual premium should, as Mr. Keesling seems to urge, be considered as a charge for the possible increase of hazard due to engaging in the service would seem unfair, in view of all the circumstances. The construction urged, it is submitted, is not warranted by the express contract; and there is no social object that might possibly be served by the creation of this obligation.

Many courts frankly put their decisions on the ground that since there was no increase of hazard and since the influenza epidemic was prevalent throughout the country, the beneficiary should recover. The Arkansas court by Hart, J., said: ⁴⁹

"In the case at bar the insured died from influenza, and the record shows that this disease was prevalent throughout the United States, and that soldiers and civilians alike contracted it and died from it. The death of the insured, then, was in no sense caused by performing any military service, or in consequence of being engaged in military service."

And later, by Humphreys, J., the court said: ⁵⁰

"It appears in the agreement of facts that the insured died of influenza on October 12, 1918, in the base hospital at Camp Pike. This disease was a disease common to soldiers and civilians alike, and was not confined to any particular locality; so it is apparent that it was not intended by the clause in question to concede that death resulted to the insured from any active service in war . . . The provision is plain and unambiguous. It exempts the company from liability on the face of the policy from death caused by war activities."

So, if the assured died of influenza or pneumonia or other disease, and those diseases were pandemic, and the percentage of deaths in the service from those causes was no greater than in civil life, surely the insurer should not be permitted to escape liability on any theory of increased hazard. On the other hand, the insurer may well argue that he charged an extra premium for the possibility of heavy losses; and that since he took his chances, why should not the assured be held to his bargain? But it seems that the charge for the risk, as it proved to be, and as the insurer could not possibly have anticipated, was unusually high; ⁵¹ and the fact that so many companies have returned

⁴⁹ *Benham v. American Central Life Ins. Co.*, *supra*, footnote 43.

⁵⁰ *Nutt v. Security Life Ins. Co.*, *supra*, footnote 43. See *Myli v. American Life Ins. Co.*, *supra*, footnote 43.

the extra premium or waived the broad meaning of the clause is a tacit acceptance of the principles which should control the administrators of great social institutions. It may be of interest, as indicating that actuaries did not regard service in the United States as an increased hazard, that the health insurance companies paid soldiers in the camps in the United States sick benefits; they would not have paid them to soldiers in France because of the normal clause exempting them from liability when the assured is sick outside the limits of the American continent.

Whether mere service in France or at sea would relieve the insurer from liability for death occurring there has not been considered directly. In *Sandstedt v. American Cent. Life Ins. Co.*,⁵² where the assured died of pneumonia in France, recovery was denied even though the assured had made every effort to secure the free permit which the company was then issuing and the papers were merely awaiting the company's approval when the death occurred. Likewise, in *Slaughter v. Protective League Life Ins. Co.*,⁵³ where the assured while serving in France with the Supply Company, Infantry, died of bronchial pneumonia after the Armistice, recovery was denied. In *Mattox v. New England Mut. Life Ins. Co.*,⁵⁴ where the assured died of pneumonia on a transport bound for France, recovery was denied. In *Kelly v. Fidelity Mut. Life Ins. Co.*,⁵⁵ where the assured was killed in a motor-cycle accident in France, recovery was allowed; however, the policy in that case contained no provision for obtaining a permit.

If the reasoning in the cases denying recovery had been that death was caused by an increase of hazard, the decisions might be sound. But the opinions clearly indicate that the repudiated ground of *status* was the basis for their decision. The result obtained in the Kelly Case—especially in a case where the policy provides for the obtaining of a permit and the payment of an extra premium—seems questionable at first sight; but it was found that the transportation of our troops was no more hazardous than the ordinary crossing of the ocean, which is no longer prohibited by any restrictions on travel, and service in France, as long as no battlefield service was required, was no more hazardous than the varied service in the United States.⁵⁶

It is submitted, therefore, that, to effectuate the intention of the insurer, recovery should be allowed wherever the assured's death was due to natural causes or to causes operating as commonly among

⁵¹ Many companies actually provided in their policies for the eventual return of any surplus above the actual cost of the additional war risk to the company. See *Mattox v. New England Mut. Life Ins. Co.*, *supra*, footnote 46; *cf. Sandstedt v. American Cent. Life Ins. Co.*, *supra*, footnote 47.

⁵² *Supra*, footnote 47.

⁵³ *Supra*, footnote 47.

⁵⁴ *Supra*, footnote 46.

⁵⁵ *Supra*, footnote 40.

⁵⁶ *Cf. Kelly v. Fidelity Mut. Life Ins. Co.*, *supra*, footnote 40.

civilians as among service men, subject, however, to the individual company's ability to pay as affected by the war losses of such company and to the proper protection of the general body of policyholders. The only condition limiting liability, where there is such a limitation, should be the death of the assured as a result of an increase of hazard due to the war. That this was the intention and that the suggested results are fair as effectuating this intention may be gathered from these considerations: the uncertainty of actuarial calculations in selecting risks, due to an absence of dependable war service experience; the liberality of insurers' practice in waiving the harsh effects of the war clause by granting free permits and paying such death claims; the fact that whatever extra premiums they charged were held as a sort of security for possible extraordinary losses, and that the insurance companies have returned the extra premiums; the fact that the insurance companies have not suffered losses which could not be distributed without appreciable inconvenience; the fact that their new business since the termination of the war has been amazing. The war clause was not intended to have the apparent meaning, because the acceptance of the normal premium is only consistent with the continuance of insurance against the ordinary risks of death. And possible ambiguities in the wording of the war clause may be found, if one is inclined to look for them. Therefore, the courts, in determining the legal obligations of the companies under the war clauses, ought to follow the administrators of the insurance funds in regarding as much the social function of an insurance fund as the words of the policy.

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